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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Clean Water Fund Priority
Score for Pell Lake Sanitary District No. 1.

Case No.: IH-96-14B

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER**

On September 16, 1996, the Department issued a final decision regarding the priority score for the Pell Lake project. On October 15, 1996, Lake Como Sanitary District #1 filed a petition pursuant to sec. 227.42, Stats., requesting a contested case hearing to review the Department's decision. By letter dated November 1, 1996, the Department granted the request. On December 4, 1996, the Department requested the Division of Hearings and Appeals hold a hearing in this matter.

Pursuant to due notice a hearing was held on March 6, 1997, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed briefs after the hearing. The last brief was received on March 20, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Lake Como Sanitary District No. 1 and Walworth County Metropolitan Sanitary District, petitioners, by

Steve Streck, Attorney
Amy Tutwiler, Attorney
Axley Brynerson
P. O. Box 1767
Madison, WI 53701-1767

Wisconsin Department of Natural Resources, by

Robin Nyffeler, Attorney
P. O. Box 7921
Madison, WI 53707-7921

Pell Lake Sanitary District, by

Thomas E. Dolatowiki, Attorney
P. O. Box 190
Burlington, WI 53105-0190

Findings of Fact

1. Pell Lake is located in southeastern Walworth County. The community of Pell Lake is located on the eastern, southern, and western sides of Pell Lake. The community of Pell Lake consists predominantly of small, residential lots. Individual private sewage systems, including on-site septic systems, holding tanks, inground pressure distribution systems, and mound systems, are used to treat the wastewater in the Pell Lake area.
2. A sanitary district, Pell Lake Sanitary District - No. 1 (PLSD), was formed in the Pell Lake area in 1991. The PLSD encompasses an area of approximately one thousand acres and had a population of 3,040 in 1990. The PLSD contracted a consulting engineering firm to investigate the needs for a sanitary sewer system for the area. In 1993, the consulting engineer prepared a facilities plan (exhibit 1) for a wastewater collection and treatment system.
3. The facilities plan report recommends the construction of a treatment plant and collection system. This plan was approved by the PLSD sometime thereafter. Plans and specifications for a treatment plant and collection system were then developed. The plans and specifications for the Pell Lake project were approved in 1996. In the summer of 1996, the PLSD was ready to move forward with financing the construction of their project.
4. The PLSD applied to the Department of Natural Resources (Department) for Clean Water Funding for its project. The Clean Water Fund Program (CWF) is a program that provides financial assistance (loans and grants) to municipalities for wastewater projects in the state. The Department of Natural Resources and the Department of Administration administer the program.
5. One portion of the CWF is the Hardship Program. The Hardship Program offers grants and low interest loans for wastewater projects to low income municipalities which cannot afford the standard subsidized interest rates offered in the regular CWF. Municipalities must satisfy the eligibility requirements in sec. 281.58(13), Stats., and Ch. NR 163, Wis. Adm. Code, before they can receive any hardship money. Pell Lake is eligible for the Hardship Program.
6. Each fiscal year a certain amount of subsidy is available for the Hardship Program - Hardship Present Value Subsidy. Since funding for the Hardship Program is limited, municipalities are assigned an environmental priority score and placed in descending order

on a funding list to determine who will receive the available funding in a given fiscal year. Each October, the hardship funding list is published in a Department publication, "To the Source."

7. Once the hardship funding list is published, hardship money may be given out for eligible costs to eligible municipalities in the order they appear on the funding list. The hardship money is given out in the priority score order until the money runs out.

8. Sometime during the summer of 1996, Pell Lake informed the Department that, for fiscal reasons, it was considering phasing the construction of the collection system portion of its project. The amount of the collection system constructed during the first phase of the project depends upon the amount of grant funding received. During the summer of 1996, Pell Lake also submitted updated information for their priority score determination. The updated information included information for scoring under sec. NR 161.03(2)(d)1, Wis. Adm. Code, and for the population score (sec. NR 161.03(7), Wis. Adm. Code).

9. On September 16, 1996, the Department issued a final decision regarding the priority score for the Pell Lake project. The Pell Lake Project was assigned a final priority score of 72.348.

10. In October, 1996, the priority scores and ranking on the funding list for fiscal year 1997 were published in "To the Source." The priority score of 72.348 placed the Pell Lake project fourth on the funding list. In October, 1996, the Lake Como Sanitary District No. 1 and the Walworth County Metropolitan Sewerage District filed a request for a hearing challenging the Department's determination of the Pell Lake project's priority score.

11. The Department's calculation of the priority score for the Pell Lake project is correct. The basis of this finding of fact is set forth in the "Discussion" section below.

Applicable Law

Section NR 161.03(2)(d)1, Wis. Adm. Code, provides:

A project is assigned a severity subscore which is the cumulative total of the following applicable categories:

1. Projects necessary to eliminate pollution of groundwater where contaminant levels exceed or are projected to exceed safe drinking water standards in ch. NR 809, or to eliminate discharges from private sewage systems located within 3 feet of high groundwater or crevassed bedrock, shall be assigned a score based on the percentage of the water supplies that are affected or the percentage of the private sewage systems discharging to high groundwater or crevassed bedrock, as follows:

a. 50% or more: 15 points;

- b. 33% to 49.99%: 12 points;
- c. 20% to 32.99%: 9 points;
- d. 10% to 19.99%: 6 points;
- e. 5% to 9.99%: 3 points;
- f. less than 5%: 0 points.

Section NR 161.03(7), Wis. Adm. Code, provides:

Each project shall receive a population score. The population score is the logarithm to the base 10 of the residential population to be immediately served by the project, divided by 10.

Discussion

The Department granted the petitioner's request for a contested case hearing with respect to two issues. The issues are:

- a. Pursuant to sec. NR 161.03(2)(d)1, Wis. Adm. Code, did the Department erroneously assign twelve points to the Pell Lake project (No. 4280-02), in a human health score calculation for groundwater contamination?
- b. Pursuant to sec NR. 161.03(7), Wis. Adm. Code, did the Department properly calculate the population score for the Pell Lake project?

The Department calculated a population score of .348 for the Pell Lake project. The population score figures into the priority score in two places. The population score itself is added as part of the sum of the priority score. The population score is also a multiplier in the human health score calculation.

The Department used a population of 3040 to calculate the Pell Lake project's population score. This figure represents the total number of persons who will be served by the Pell Lake Treatment Plant. Pell Lake is now planning on constructing its collection and treatment system in phases. The petitioners argue that only the population which will be served by phase one of the project should be used in calculating the priority score.

The population score is based on the "residential population to be immediately served by the project." The issue is whether the word "project" should be construed as the individual phases of the Pell Lake project or the complete treatment and collection system. The Department has not defined the word "project" for purposes of calculating the

population score. In calculating the population score for the Pell Lake project's priority score, the Department considered the project to be the entire collection system and treatment plant.

Applicants for CWF have an incentive to overstate the scope of a project if it will result in a higher priority score. Therefore, it is possible that an applicant may treat a series of projects as phases of one project. There is no guarantee that the additional phases will ever be constructed; therefore, it is unfair to other applicants to allow an applicant to treat the series of projects as one large phased project. The Department must review each application individually to ensure that all applicants are treated fairly.

In the instant case, the Department treated the treatment plant and the complete collection system as one project even though it will be constructed in phases. This was a reasonable manner to view the project. The testimony at the hearing indicated that phase one of the project would include the entire treatment plant and a portion of the collection system. Since a treatment plant designed to accommodate the population of the entire Pell Lake Sanitary District will be constructed, it is reasonable to assume that the remaining phases of the collection system will eventually be constructed. For purposes of this application, this is a reasonable manner to calculate the population score.

With respect to the calculation of the score for groundwater contamination, the issue is whether the Department properly calculated the percentage of private sewage systems which are discharging to high groundwater. There are two ways to approach this issue. The first way is to consider the documentation the Department staff had when they calculated the priority score and determine whether the score was properly calculated. The documentation that the Department had was material supplied by Baxter & Woodman. This material indicates that out of 1,292 private sewage systems, 452 are failing. This calculates to a percentage of 35% which entitles Pell Lake to twelve points in the human health score. This approach is reasonable because it ensures that all applicants are treated the same.

The other way to approach this issue is to review the documentation provided and make adjustments if justified. The petitioners argue that the updated documentation supplied by Baxter & Woodman is flawed and; therefore, the score is incorrect. Parenthetically, it should be noted that if Pell Lake had not supplied the updated documentation, the Department would have used a letter from the county sanitarian to compute this component of the priority score. Based on the information from the county sanitarian, the Department initially awarded the Pell Lake project fifteen points for groundwater contamination. However, after receiving more refined documentation from Baxter & Woodman, the Department subtracted three points from the groundwater contamination score.

The primary issue is whether holding tanks should be counted as private sewage systems. The Department historically has counted holding tanks as private sewage systems. However, sec. NR 161.03(2)(d)1, Wis. Adm. Code, refers to projects which will "eliminate discharges from private sewage systems located within three feet of high groundwater or a crevassed bedrock." Holding tanks are not designed to discharge to groundwater; therefore, holding tanks should not be counted unless they are actually discharging to groundwater (i.e. leaking or overflowing). The petitioner has the burden of proof to show any of the holding tanks counted were improperly counted; however, witnesses for Pell Lake concede that they have no evidence 32 of the holding tanks counted are discharging into the groundwater. Therefore, one should deduct these holding tanks from the total of 452 private systems which are discharging into the groundwater.

The number of failing private systems should be reduced to 420¹. However, if one uses this evidence, which was not available to the Department at the time it calculated the Pell Lake project's priority score, one should also use other new evidence which will affect this calculation. At the hearing, witnesses for the PLSD testified that they calculated the number of residences in the Pell Lake Sanitary District by dividing the projected population by 2.56. They subsequently counted the number of houses and the actual number is 1,212. If one deducts both the holding tanks for which there was no evidence that they are discharging into the groundwater, one must also reduce the number of private systems used in the ratio.

If this is done, the percentage of private sewage systems which are discharging within three feet of high groundwater is 35% (420 divided by 1212). This percentage still exceeds 33% and the number of points the Pell Lake Project is entitled to remains at twelve. Thus, regardless of the approach one uses in treating this issue, the ultimate conclusion is that the human health score for the Pell Lake Project will remain the same and the Pell Lake priority score is correct.

¹ The petitioners allege an additional thirteen private systems should not be counted. The thirteen systems include nine holding tanks which are allegedly overflowing due to improper maintenance and four septic systems which were installed after the effective date of sec. ILHR 83.10(2), Wis. Adm. Code. With respect to the nine holding tanks which are allegedly overflowing due to improper maintenance, the petitioners argue that the Department has expressed an intent in ch. NR 161, Wis. Adm. Code, not to include within the human health score contamination resulting from improper maintenance. I find that since these holding tanks are overflowing and; therefore, discharging into the groundwater they should be counted for purposes of calculating the percentage for sec. NR 161.03(2)(d)1, Wis. Adm. Code.

With respect to the four septic systems which were installed after the effective date of sec. ILHR 83.10(2), Wis. Adm. Code, the documentation provided by Baxter & Woodman indicates these systems are discharging to high groundwater. The fact that the systems were constructed after the effective date of sec. ILHR 83.10(2), Wis. Adm. Code, and therefore, presumably comply with this regulation is insufficient to prove that the four systems were improperly counted. Nevertheless, even if these additional thirteen private systems are deducted from the total, based on a total of 1212 houses, the percentage of private systems discharging within to high groundwater still exceeds 33% (407 divided by 1212 = 33.6%).

Conclusions of Law

1. Pursuant to sec. NR 161.03(2)(d)1, Wis. Adm. Code, the Department correctly assigned twelve points to the Pell Lake project in the human health score calculation for groundwater contamination.
2. Pursuant to sec NR. 161.03(7), Wis. Adm. Code, the Department properly calculated the population score for the Pell Lake project.
3. Pursuant to sec. 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The priority score calculated by the Department of Natural Resources for the Pell Lake project is affirmed.

Dated at Madison, Wisconsin on May 7, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: Mark J. Kaiser
Mark J. Kaiser
Administrative Law Judge